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February 9, 2007

Via U.S. Mail & email: jdunlap@cascadehome.com

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RE: Use of Aquifer Storage and Recovery (ASR) Techniques Under Existing Montana Law
Our file no: 28050\001

Dear John:

This letter is in response to your request for a synopsis of the existing legal framework in Montana for changing seasonal surface water irrigation rights to year-round potable groundwater supplies using Aquifer Storage and Recovery (ASR) techniques. I understand that the ASR model was recently presented by you and your consulting engineers, HKM, Inc. and Pacific Groundwater Group (PGG) of Seattle, Washington, to the Director's office of the Montana Department of Natural Resources and Conservation. In this letter I have set forth my opinion on the existing legal framework in Montana that allows for the ASR approach to be utilized under existing law.

CHANGES IN APPROPRIATION RIGHTS

Mont. Code Ann. § 85-2-102 defines a change in appropriation right as a change in the place of diversion, the place of use, the purpose of use, or the place of storage. A strict interpretation of the statute does not allow an expansion of the period of diversion of an existing water right. As a result, applicants seeking to change existing seasonal irrigation rights to year-round potable water use need to implement some type of storage during their period of diversion in order to release or withdraw stored water during the winter months. PGG's ASR model is a method of diverting and storing water in an aquifer during the historical period of diversion and subsequently withdrawing that water to meet winter needs.

In Montana, there is no statute or case law specifically recognizing a change in use from surface water to groundwater; however, there is nothing in Montana law prohibiting such a change. Moreover, the 1973 Water Use Act recognizes the interconnection between surface and groundwater supplies. Mont. Code Ann. § 85-2-102(20) defines water as all water of the state, surface and subsurface, regardless of its character or manner of occurrence. All water is subject to the Act. Mont. Code Ann. §§ 85-2-102(1), 85-2-302(1), 85-2-102(20).

While Montana statutes recognize the connection between surface and groundwater, there is little case law in Montana regarding conjunctive administration of surface and groundwater. Other prior appropriation jurisdictions recognize conjunctive administration of surface and groundwater and an appropriator's right to change water rights from surface water diversions to groundwater withdrawals. *See e.g., In the Matter of Rules and Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water*, 674 P.2d 914 (Colo. 1983). In areas of New Mexico where regulations require a transfer of sufficient surface water rights prior to granting a permit for new groundwater use, the state engineer handles applications for a new groundwater use as an application to change a point of diversion and purpose of use of the existing surface water rights transferred. *Montgomery v. New Mexico State Engineer*, 137 NM 659, 114 P.3d 339 (2005).

Under the ASR approach, a change in point of diversion may or may not be necessary depending on the design of the system. If the historical ditch system is used to divert water from the surface source, the primary point of diversion will not change. Rather, a new place of storage – i.e., underground storage in the aquifer – will be added to the existing right in addition to a change in purpose of use. Mont. Code Ann. § 85-2-102(4). Water is injected or infiltrated into aquifer storage through secondary diversions on the ditch. Recovery wells likewise constitute secondary diversions to withdraw the water stored in the aquifer, and should not require an authorization to change point of diversion as long as the applicant can demonstrate that the water withdrawn via these wells is simply water recovered from storage rather than additional water appropriated from the aquifer source. This can be demonstrated through the use of groundwater modeling techniques and a water balance approach.

The use of an aquifer as a storage/conveyance facility is implicitly recognized by existing Montana law. Since 1885, Montana law has allowed an appropriator to convey and store water in natural surface channels and features. Mont. Code Ann. § 85-2-411 provides:

> Water appropriated under an existing right or pursuant to this chapter may be turned into the natural channel of another stream or from a reservoir into the natural channel and withdrawn or diverted at a point downstream for beneficial use, but the waters of that stream may not thereby be diminished in quantity or deteriorated in quality to the detriment of a prior appropriator. Water stored in a reservoir under an existing right or pursuant to this chapter which is turned into a natural channel for withdrawal or diversion and beneficial use downstream shall not be considered a part of the natural flow of that stream.

This statute has not been directly applied to groundwater. However, prior to adoption of the 1962 groundwater code, groundwater was treated differently than surface water, and was only subject to the law of prior appropriation if it was proven to be "flowing in defined channels reasonably ascertainable". *Ryan v. Quinlan*, 45 Mont. 521, 533, 124; P. 512 (1912). The 1962 Groundwater Code eliminated the myth of the "underground river" by defining and recognizing the concept of aquifers. 89-2911 R.C.M. 1947. Since surface and groundwater are recognized as the same resource under the 1973 Water Use Act, existing law should allow an appropriator to appropriate surface water and "turn" that water into an aquifer, as an underground conduit or storage reservoir, the same as using a natural water course to convey water to a secondary point of diversion pursuant to Mont. Code Ann. § 85-2-411.

Mont. Code Ann. § 85-2-411 also requires that water quality in the aquifer not be diminished to another user's detriment. Thus, ASR modeling should also address water quality issues under applicable standards.

Obviously, modeling of the aquifer is an essential part of such an application. Control over the water appropriated is an important element of an appropriation right. *Rock Creek Ditch Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933). Modeling of the aquifer becomes essential to demonstrate that the water injected can be stored and controlled in a manner sufficient to constitute a protectable appropriation.

Additionally, there is authority in Montana concerning the use of an aquifer as a natural underground conveyance and storage system for a surface water right. In *Perkins v. Kramer*, 148 Mont. 355, 423 P.2d 587

(1966), Perkins diverted water from Dempsey Creek and conveyed it by ditch to several glacial "potholes" that served as storage ponds. Perkins claimed that seepage water from these ponds saturated the hillsides adjacent to Dempsey Creek, raised the water table, and eventually returned to Dempsey Creek. Perkins placed measuring devices in Dempsey Creek above and below the reach of the creek adjacent to the ponds, measured the accretions to the creek, and claimed the right to divert that amount of water at a point further down Dempsey Creek as "developed" water. The district court upheld Perkins' claim.

The Supreme Court reversed the district court, holding that the evidence demonstrated that increased flows in Dempsey Creek could have been due to heavy rains, and that the appropriator did not establish a sufficient degree of control over the water. *Perkins*, 148 Mont. at 361. The Court further held that at best Perkins had proven that he had a reservoir composed of surface water and groundwater, in undetermined quantities, and that the reservoir leaked into Dempsey Creek. *Perkins*, 148 Mont. at 364. However, in rejecting the claim, the Court noted that such a claim was viable with the proper amount of proof:

> Modern hydrological innovations have permitted more accurate tracing of groundwater movement. For this reason, we feel that traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists. The use of chemical dyes, chloride solutions, and radioisotopes to trace groundwater migration is well-established. More recent techniques include the use of electric analogs and computer analysis. These tracing methods require the drilling of test wells as well as geological analysis of the water-bearing structure. See 'Water Supply Engineering', Babbitt and Doland (1931); 'Hydrology', Ed. Mainzer (1942); 'Ground Water Hydrology', Todd (1959), 'Theory of Acquifer Tests', Geological Survey Water-Supply Paper 1536-E, U. S. Gov't Printing Office (1962); 'Electric Analog of Three-Dimensional Flow to Wells and its Application to Unconfined Acquifers', Geological Survey Water-Supply Paper 1536-H, U. S. Gov't Printing Office (1963); 'Methods of Determining Permeability, Transmissibility and Drawdown', Geological Survey Water-Supply Paper 1536-I, U. S. Gov't Printing Office (1963). Most of these techniques were available at the time the respondent attempted to prove the identity of the seepage water, but none were utilized.
>
> The burden of proof necessary to show the use of natural subterranean watercourses as conduits in a developed reservoir system must be a substantial one. There should be

> some recourse to modern hydrological techniques and not mere conjecture based on inconclusive data and ordinary observation.

Perkins, 148 Mont. at 363 (Emphasis added). *Perkins* was decided in 1966. The "substantial" burden of proof required in *Perkins* is still controlling law. Groundwater hydrology, and particularly modeling techniques, have advanced significantly in the 40 years since *Perkins*. Thus, a change in use application that incorporates modern hydrology and state-of-the-art groundwater modeling techniques to demonstrate that water stored in an aquifer can be recovered by the applicant without adverse affect to others should be a viable option under existing Montana law.

In summary, the 1973 Water Use Act recognizes the connection between groundwater and surface water supplies. Adverse affect is the primary issue in any application to change a water right, whether surface water or groundwater. Montana's change statute allows changes in or addition of storage for existing surface water rights; the *Perkins* case further recognized that aquifer storage was possible and simply a matter of proof. ASR modeling provides precisely the type of "substantial proof" described in *Perkins* that should allow an applicant to divert and store an existing surface water right in an aquifer and later withdraw the water from storage.

I hope this synopsis is helpful. Please let me know if I can be of further assistance.

Sincerely,

MICHAEL J. L. CUSICK

MJLC/smk
SK3812.WPD

Common Sense Approach to Water Use and Growth Under Existing Montana Law

Overview

- Aquifer Storage Recovery (ASR) allows continued economic growth without change in existing law.
- ASR allows for change in use of existing surface water rights from irrigation to domestic.
- Monitoring and assessment must be required to ensure water quality and water quantity balance.

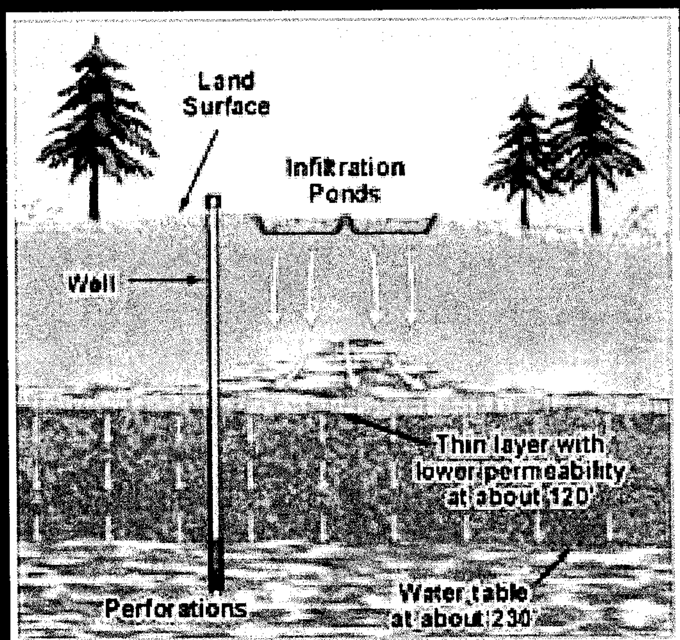
Problem Definition

Water storage must be used to enhance water availability by extending the period of use of existing surface water rights.

ASR – An Effective Solution

- Closed basins with limited water availability can continue to grow by storing water with ASR.
- Growth can be accomplished using existing surface water rights.
- Surface water rights can be changed within existing Montana law using a change of use application (85-2-402).

ASR – An Effective Solution

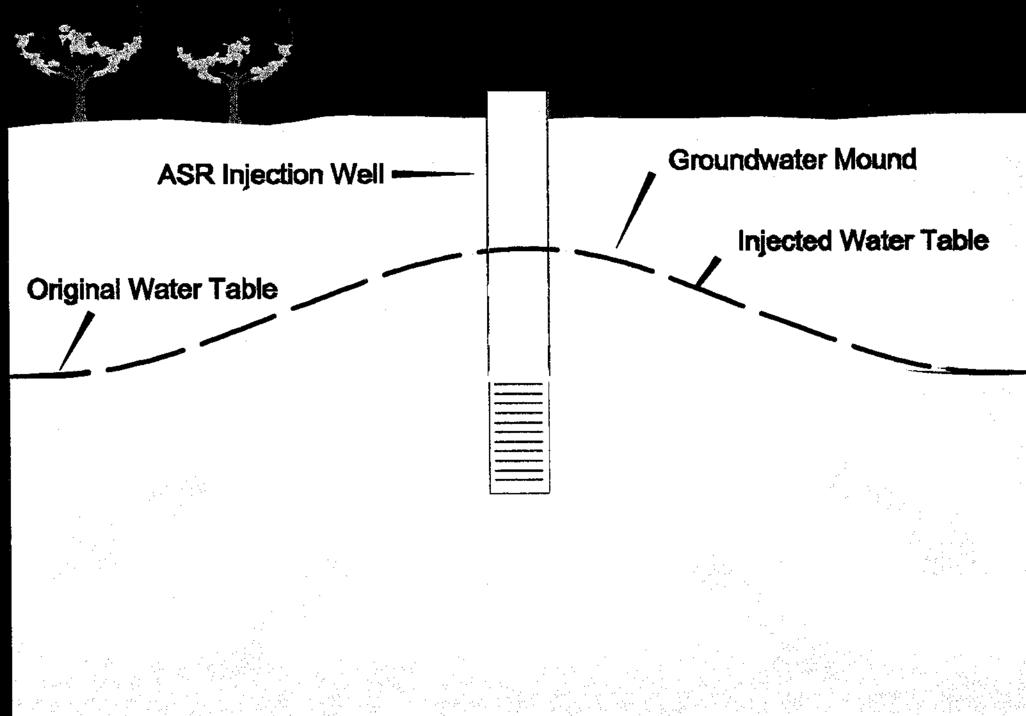


The ASR concept is simple: store water underground when river levels are high, then pump the stored water out when it's needed.

ASR – An Effective Solution

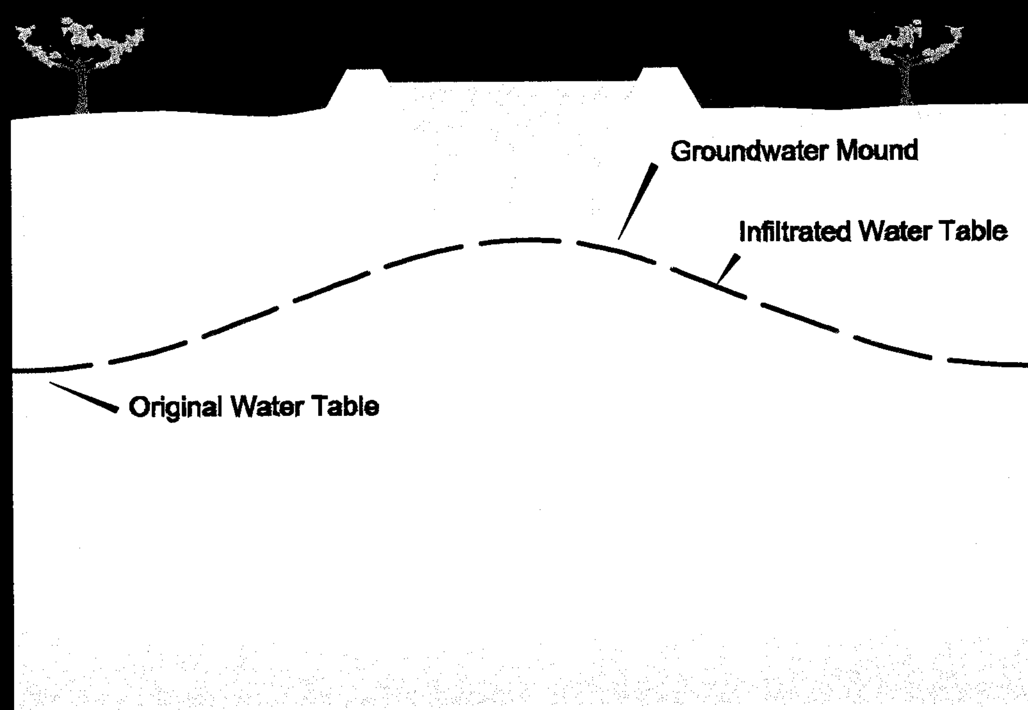
River water can be stored in an aquifer by injecting it in wells or infiltrating it through basins.

Water injected to an aquifer through a well causes the water table to rise.



The result is a groundwater mound.

Water infiltration through an unlined basin also results in a groundwater mound.



When needed, the water in the mound can be pumped out, resulting in no net depression of the water table.

ASR Success Defined As:

- No depletion of base stream flows and protection of senior water rights
- No groundwater contamination – ensures water quality
- No groundwater depletion

Requirements for ASR Success:

- Characterization by a qualified hydrogeologist to assess potential impacts.
- Long-term monitoring to ensure water quality and a balance in water quantity.

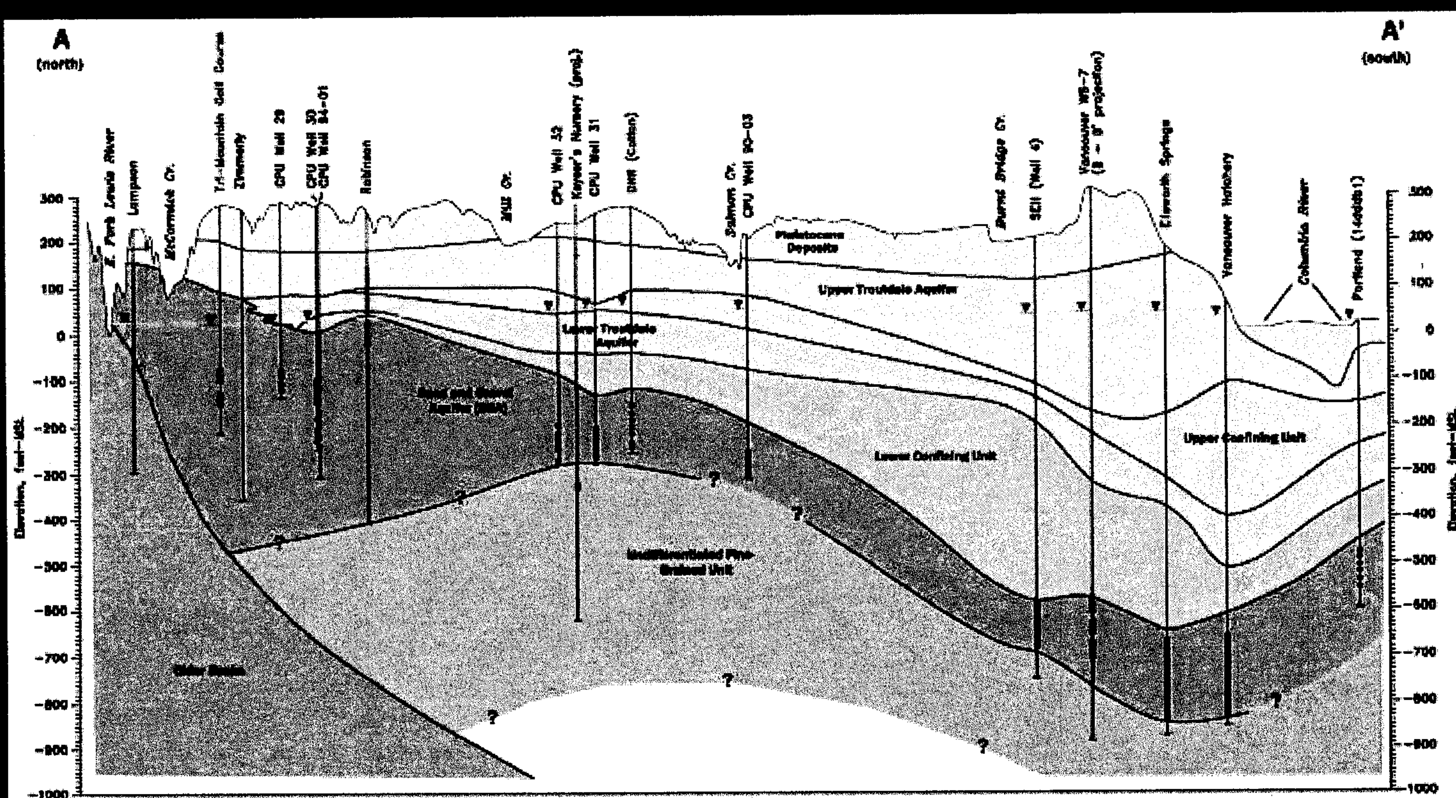
Characterization

Groundwater professionals should study impacts to all surface waters.

The studies must be completed to assure the protection of senior water rights.

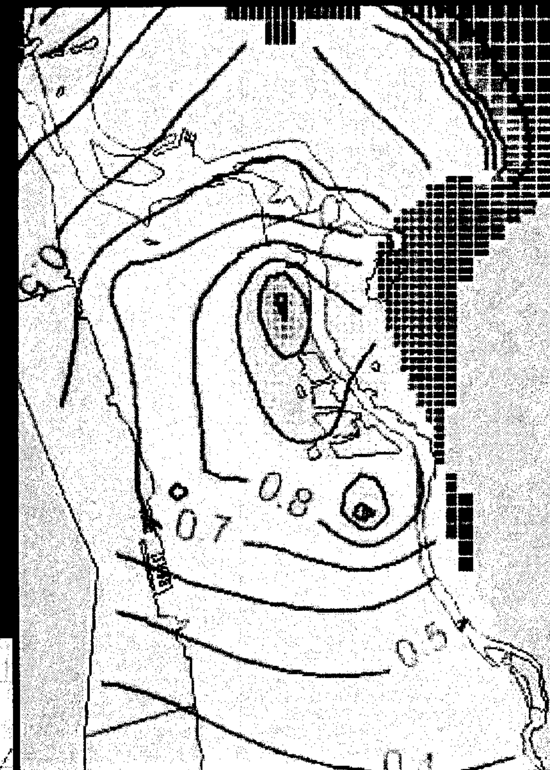
Characterization

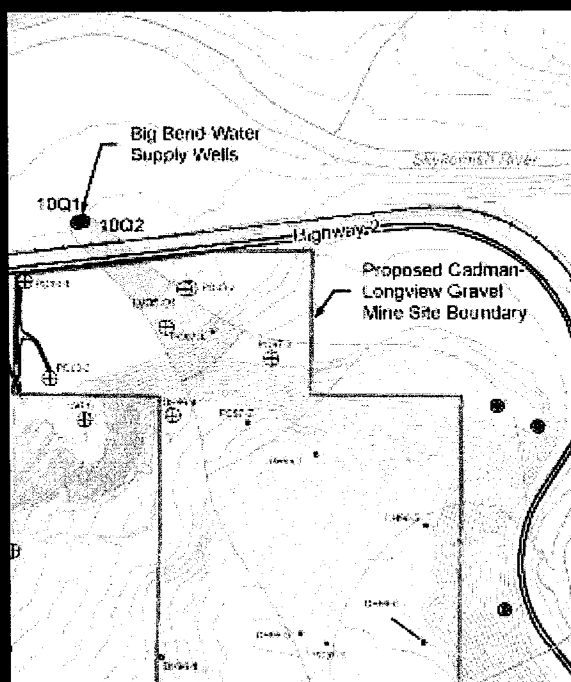
Groundwater professionals are required to understand the highly complex hydrologic systems.

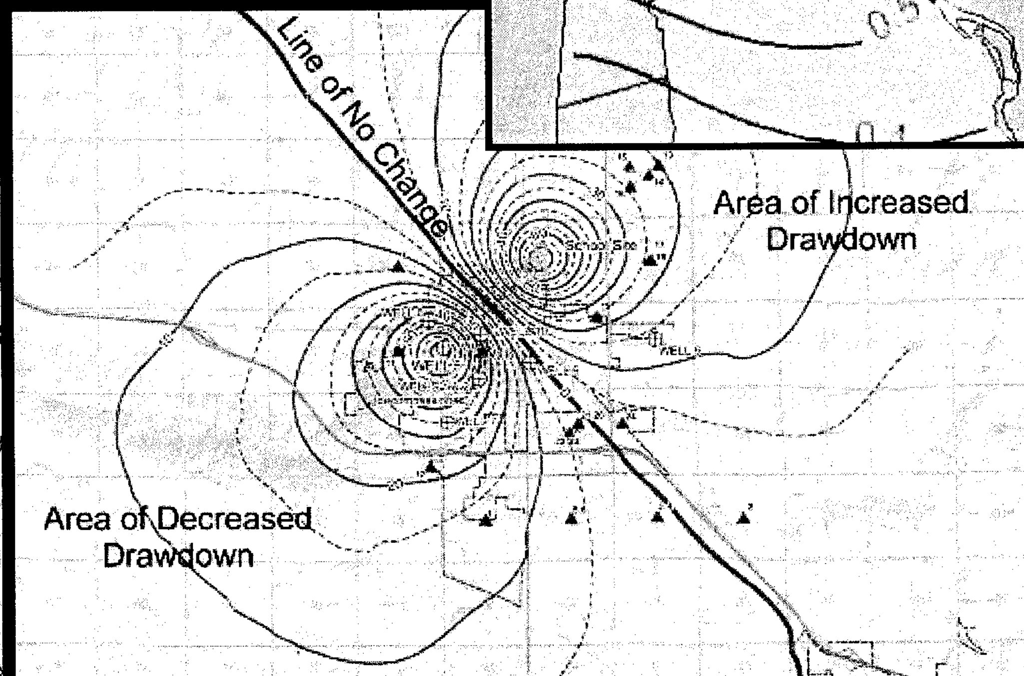


Characterization

Computer models are used to predict impacts to rivers and the geometry of the groundwater mounds.



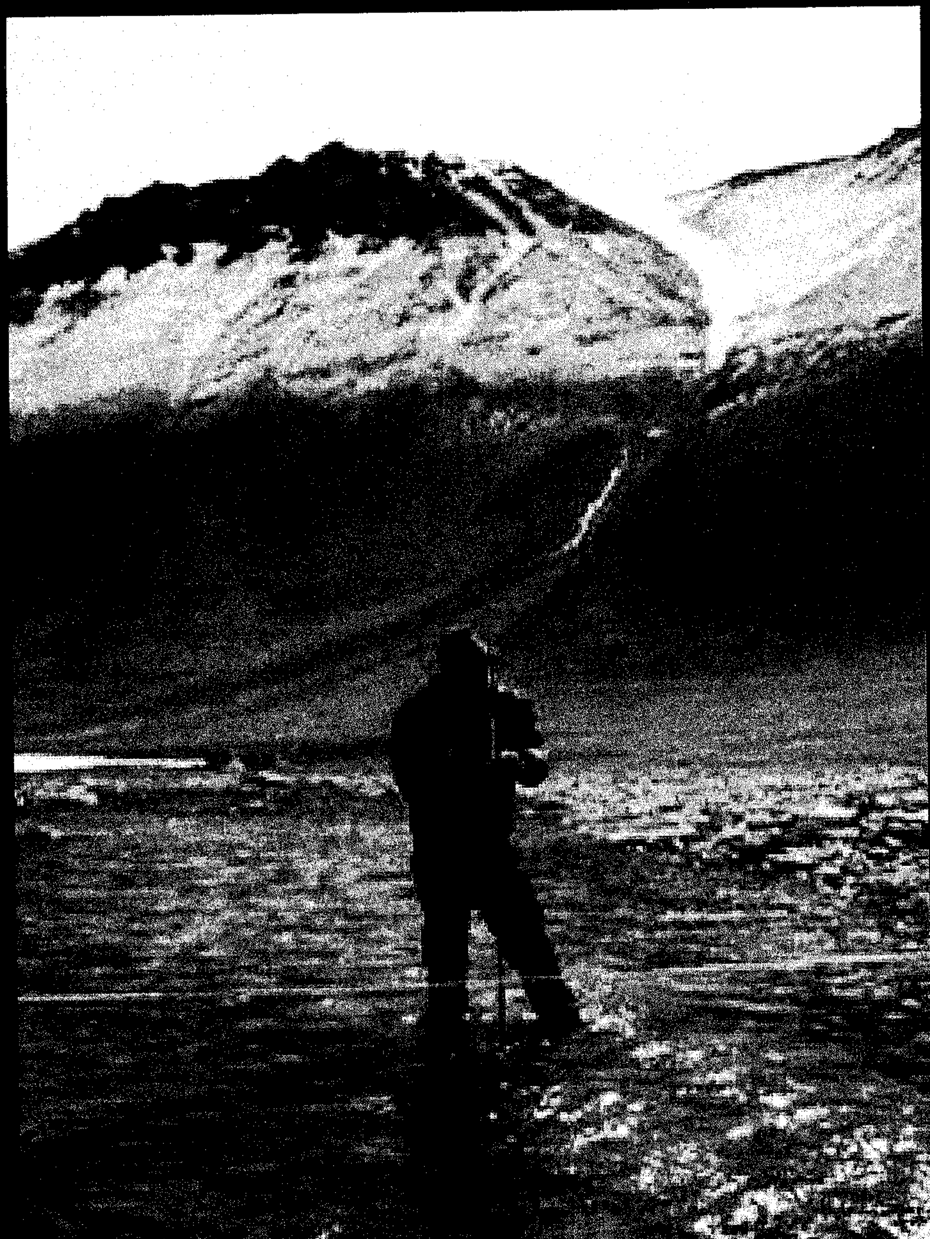




Long-Term Monitoring

Frequent water quality monitoring is necessary to avoid potential contamination of groundwater and surface water.

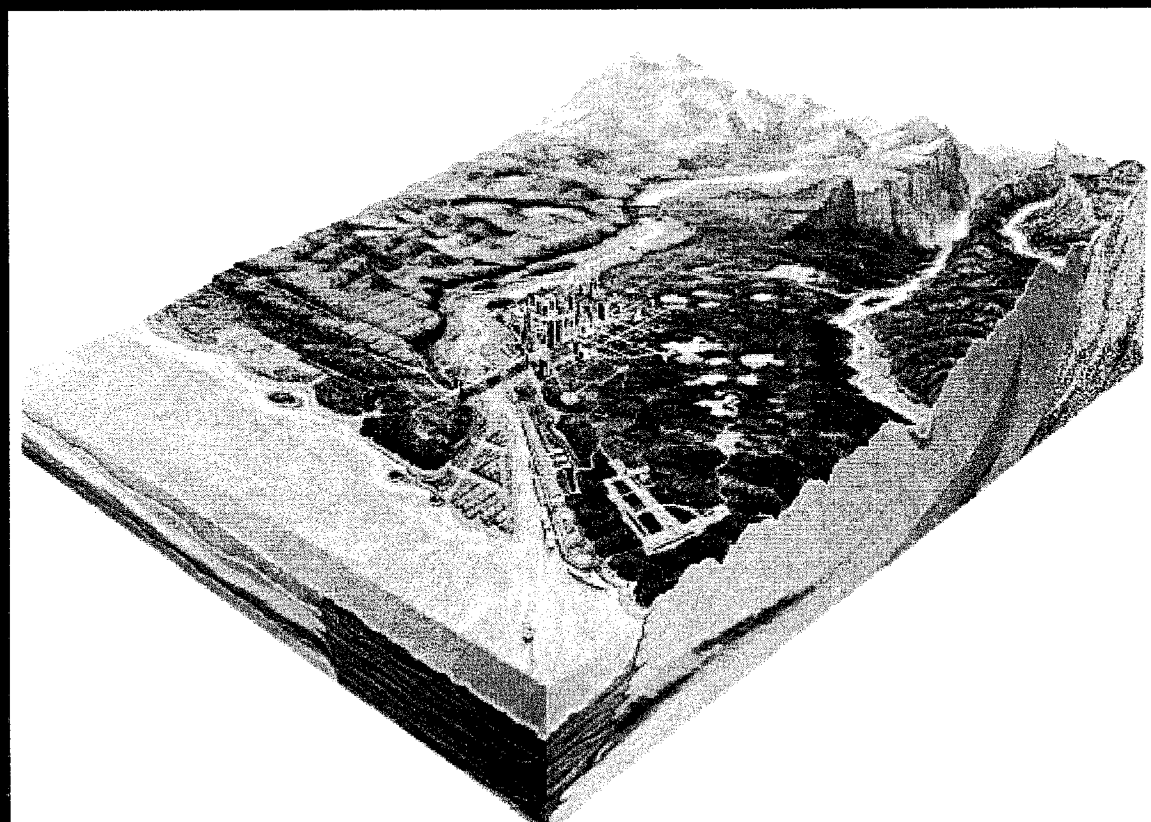
Long-Term Monitoring



Monitoring stage and flow is required to assure water diverted from the river is replaced 100%

Consequences

Failure to characterize the system and monitor the project can result in…



…dry rivers
and creeks…

…groundwater
level declines
and dry wells…

…groundwater and
eventually surface
water contamination.

Conclusions

- Through a change of use in existing surface water rights, ASR allows economic development to continue under existing Montana law (85-2-402).
- ASR can mitigate surface water diversions 100% and ensure the protection of senior water right holders.
- Detailed studies and long-term monitoring are required to maintain water quality and a balance in water quantity.